IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

APPEAL FROM ORDER NO.872 OF 2004

Smt.Lata Suresh Jethani)
aged 49 yrs., Indian Inhabitant)
carrying on her business at Shop No.4)
Hill Crest Co-operative Housing Society)
Ltd., 16th Road, Bandra (West))
Mumbai 400 050.).. Appellant
(Org.Plaintiff)

Versus

1) Hill Crest Co-operative Housing)
Society Ltd., a Society registered)
under Maharashtra Societies Act)
having its office at Plot No.86)
16th Road, Bandra (West))
Mumbai 400 050.)

2) M/s.Meeti Investments & Consultancy)
Services Pvt. Ltd., a Limited)
Company, having its office at 1st)
Floor, Mahapalika Market, Near)
Vikas Park, Link Road, Mith Chowky)
Malad (West), Mumbai 400 064.)

3) The Municipal Corporation of Greater)
Mumbai, a body corporate having its)
office at Mahapalika Marg)
Mumbai 400 001.).. Respondents
(Org.Defendants)

Mr.J.Rais with Mr.S.A.Lilani i/b.M/s.Lilani Shah & Co. for the Appellant.

Mr.Y.S.Jahagirdar i/b.Mr.Sandesh Patil for Respondent No.1.

Mr.A.C.Singh i/b.D.R.Shah for Respondent No.2.

Mr.J.Xavier for Respondent No.3.

CORAM: SMT.NISHITA MHATRE, J.

JUDGMENT RESERVED ON : 3RD NOVEMBER 2004

JUDGMENT PRONOUNCED ON : 1ST DECEMBER 2004

JUDGMENT :

. By consent, Appeal heard finally at the stage of admission itself.

2. This Appeal From Order has been filed impugning the order rejecting the Notice of Motion filed in the Suit filed by the Appellant-original Plaintiff.

3. The Appellant claims to be a member of Respondent No.1 Society. She has been in use and occupation of Shop No.4 on the ground floor of the building which consists of three wings. On 12th May 2002, it appears that the Society at a General Body Meeting resolved to develop the property by using the balance FSI and Transferrable Development Rights (TDR) available. This move was made by the members of the Society since the building required major repairs which would necessarily mean that the Society would incur heavy expenditure since the building was built in the year 1962. The Society then sent a letter dated 3rd July 2002 to all the members including the Plaintiff enclosing a copy of the proposed plan. It was proposed that the Developer i.e. Respondent No.2 would reinforce the existing structure besides constructing several columns to support the proposed additional floors without affecting the original building which consisted

of ground and three upper floors. It appears that all the members except the Appellant and six others agreed to the development of the building. Each of the members were paid Rs.8,50,000/- by the Developer i.e. Respondent No.2 herein. Respondent Nos.1 and 2 were also ready and willing to pay the same amount to the Appellant who refused the same. The Development Agreement was executed by Respondent Nos.1 and 2 on 10th November 2003 which was approved at a General Body Meeting.

4. According to the Appellant, the plan for the proposed construction shows that one column was to be erected directly in front of her shop which would affect the light and air to her shop as well as access for her customers to the shop. Correspondence ensued between the Appellant and Respondent No.1. Respondent No.1 agreed to shift the column which, according to the Appellant, was blocking her shop premises. Permission was, therefore, sought from Respondent No.3 Corporation for a change in the plans which was sanctioned. Accordingly, the initial work for the proposed construction commenced sometime at the end of the year 2003.

5. Being aggrieved by the decision taken by the Society to develop the property, the Appellant filed the

present Suit before the City Civil Court on 9th January 2004. As the altered plans had not been sanctioned till June 2004, work of digging or piling for construction of columns did not commence till then. Ad-interim relief was refused to the Appellant on 17th June 2004. An Appeal From Order was preferred by the Appellant before this Court which was disposed of on 12th July 2004 directing the trial Court to dispose of the Notice of Motion on merits expeditiously within four weeks. It appears that a statement was made before this Court when the Appeal From Order was disposed of that Respondent Nos.1 and 2 would not raise and/or construct any column adjoining or near the Appellant's premises i.e. Shop No.4. The Notice of Motion was heard and disposed of on 2nd September 2004. The trial Court held that the proposed column which was near the Appellant's shop was about 2.46 mtrs. away on the Western side of the shop and was in no way an obstacle to the Appellant's customers. The trial Court, therefore, refused the temporary injunction sought by the Plaintiff.

6. Mr.Rais submits on behalf of the Appellant that the trial Court has completely erred in its approach by dismissing the Notice of Motion since the development plans were not sanctioned by the Municipal Commissioner. According to the learned Counsel, there was a deficiency in open spaces to be provided. This deficiency was

condoned by subordinate officers in breach of the provisions of the Maharashtra Regional and Town Planning Act, 1966 (hereinafter referred to as the "MRTP Act") and the Development Control Regulations, 1991. The learned Counsel submits that the trial Court has not considered the judgment of the Division Bench of this Court in **Writ Petition No.379 of 2003 along with Writ Petition No.2822 of 2003** (*Mr.Rajendra Thacker* vs. *Municipal Corporation of Greater Mumbai and another*) dated 5th May 2004 where it has been held that it is only the Municipal Commissioner who can grant concessions in accordance with the Development Control Regulations and the MRTP Act. He further urges that any development of the property would cause reduction in open space and thereby be a hindrance for car parking and access to the shop premises of the Appellant.

7. Mr.Jahagirdar, learned Counsel appearing for Respondent No.1 Society, submits that a dispute between the Appellant who claims to be a member of the Society and the Society could not be dealt with by the Civil Court and it was necessary for the Appellant to file a dispute before the Co-operative Court under the provisions of the Maharashtra Co-operative Societies Act, 1947. He submits that when the Society and the Developer realised that as per the original plan for re-development, a column did partially obstruct the shop

premises of the Appellant, the said column was shifted. According to the learned Counsel, the new position of the proposed column does not in any manner affect the ingress and egress of the customers of the Appellant to the Appellant's shop nor does it adversely affect the light and air enjoyed by the Appellant in the shop. He then drew my attention to the fact that all the plans have been sanctioned by the appropriate authorities and work has commenced only after the sanctioned plans were made available to the Society. The learned Counsel also submits that the judgment in the case of *Rajendra Thacker* (supra) does not cover the property in the present suit as those Writ Petitions were in respect of violations of the Development Control Regulations in "R" and "K" Wards of the Bombay Municipal Corporation. The suit property falls within "H" Ward at Bandra.

8. Mr.A.C.Singh, learned Advocate appearing for Respondent No.2, who is the Developer of the Society, supports the submissions made by Mr.Jahagirdar. He submits that out of 35 occupants of the suit building, 33 have signed agreements with the Developer and permitted development of the suit property. All the shop owners except the Appellant have signed the agreements. Each member of the Society who has signed the agreement has been paid Rs.8,50,000/-. He further submits that it is only because of the adamant attitude

of the Appellant that the construction is not able to proceed.

9. Mr.Xavier for Respondent No.3 Bombay Municipal Corporation (hereinafter referred to as the "Corporation") submits that the affidavit filed by the Corporation in the Notice of Motion indicates that the plans were approved for the proposed fourth floor over the existing ground plus three storied building. The proposal was to construct the additional floor with the help of external columns and a service slab in lieu of 400 sq. mtrs. Transferable Development Right (TDR) and accordingly an I.O.D. was issued on 3rd December 2003. It appears that thereafter the Developer, Respondent No.2 herein, purchased TDR and amended plans were submitted on 8th March 2004 which were approved after a month for the construction of additional floors over the existing structure. The columns were permitted to be constructed upto 8.6 feet except in respect of four columns where the members had not consented to the construction of these columns. On 3rd July 2004, the Architect submitted amended plans which were approved on 4th August 2004 after the incorporation of the suggestions made by the Structural Engineer of the Corporation.

10. The facts in this case indicate that the

proposed column is about 2.46 mtrs. away from the shop of the Appellant on the Western side and would not in any way be an obstacle for the customers to enter the shop of the Appellant. Furthermore, the apprehension of the Appellant that the frontage of the shop would be affected is not borne out by the documents placed before me. The trial Court has considered all these factors and has found that there is no need to grant any temporary injunction. I do not see any reason to interfere with this finding of the trial Court on the facts before me. The only question which would be required to be considered is whether in view of the judgment of the Division Bench of this Court in the case of *Rajendra Thacker* (supra) whether all relaxations in respect of Development Control Regulations are to be sanctioned only by the Municipal Commissioner or by any subordinate officer ?

11. There is no dispute that the construction is being commenced on the basis of sanctioned plans. However, by relying on the judgment in *Rajendra Thacker* (supra) it is submitted on behalf of the Appellant that since the concessions for relaxing the conditions required to be adhered to under Regulation 64(b) of the Development Control Regulations were not sanctioned by the Municipal Commissioner, the action of the Respondents is illegal. The Division Bench in *Rajendra*

Thacker (supra) was dealing with a Writ Petition filed as a Public Interest Litigation, which sought to prevent the proposed regularisation of several unauthorised constructions in the city of Mumbai by permitting relaxations and concessions of certain conditions in the Development Control Regulations. While dealing with such unauthorised constructions in respect of "R" and "K" Wards, the Division Bench considered the factual matrix before it and held that the power of the Municipal Commissioner to permit the retention of unauthorised development flows from Section 53(3) read with Sections 44 to 46 of the MRTP Act. According to the Division Bench, it is only the Municipal Commissioner who is empowered to grant such concessions by way of relaxation under Regulation 64(b) in specific cases where a clearly demonstrable hardship is caused as provided thereunder. This hardship need not merely be a self created hardship of the builders/developers/architects, but the Commissioner is required to consider the hardship which may be caused by the proposed modifications to the directly affected persons such as residents, purchasers and neighbours as well. While exercising this power, the Commissioner is expected to consider any representation made by such persons. The Commissioner is required to apply his mind to the existence of the demonstrable hardship and to ensure that the grant of such modification/relaxation

will not affect the health and safety of the inhabitants of the building or neighbourhood. The Division Bench has held that the powers and duties of the Commissioner which can be deputed to the Director (Engineering Services and Project) are the powers which are exercised by him under the Mumbai Municipal Corporation Act and not those which are conferred upon him under the MRTP Act. The Municipal Commissioner is required to give due regard to the existence of a demonstrable hardship while deciding an application for retention under Section 53(3) read with Sections 44, 45 and 46 of the MRTP Act. However, the Division Bench has observed that if the person who is interested and has shown that he would suffer demonstrable hardship by such relaxation/ retention is adequately compensated, this factor must be taken into consideration while deciding applications for relaxation of Development Control Regulations.

12. Mr.Rais places reliance on the judgment of the Division Bench in *Rajendra Thacker* (supra) to submit that the Respondents have not adhered to the Development Control Regulations and the MRTP Act by leaving adequate open spaces while developing the additional floors. However, prima facie, there is nothing on record to show that these plans have been approved despite their being no adequate space available nor is there anything on record to show that concessions were sought for and

granted. Assuming such concessions were sought for and granted, it was always open for the Appellant to move the Municipal Commissioner by way of a representation establishing the fact that there was demonstrable hardship caused to her on account of the development of the suit building by addition of three floors. Since there is nothing on record to show, prima facie, that the Respondents have violated the provisions of the Act and the Development Control Regulations, the question of availing of any relaxation or regularisation does not arise. Therefore, the plans which do not seek relaxation or regularisation need not be signed by the Municipal Commissioner. The Division Bench has clearly held that it is only when concessions are sought in respect of relaxation of certain terms and conditions of the Development Control Regulations that it is the Municipal Commissioner who is required to grant such concessions. There is nothing on record to show that such concessions have been sought. Plans were sanctioned after the TDR was obtained by the developer, Respondent No.2. Sanction was accorded by the officer empowered under the Bombay Municipal Corporation Act, 1888 and, therefore, the judgment of the Division Bench in *Rajendra Thacker* (supra) will not be attracted to the facts and circumstances in the present case.

13. There is, therefore, no need to interfere with

the order of the trial court. Appeal From Order dismissed. No order as to costs.

14. In view of the Appeal From Order being disposed of, nothing survives in Civil Application No.1203 of 2004 and the same is disposed of accordingly.

15. Certified copy expedited.